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THE LATER HISTORY OF THE RULE OF DESTRUCTIBILITY OF CONTINGENT REMAINDERS

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Contingent remainders—Defined: A contingent remainder is a legal future interest after a particular estate of freehold limited upon an event (precedent in fact and in form to its taking effect in possession) which may happen before or after, or at the time of or after, the termination of the preceding estate of freehold. This group of remainders is not described for the mere pleasure of abstruse classification but because certain important legal attributes attach to remainders of this class.¹ From the time of the feudal land law to the present day they have been inalienable *inter vivos* while they remained contingent. Prior to 1430 they were wholly void. After that they became valid if the event upon which they were limited happened before or at the time of the termination (whenever and however that might occur) of the preceding estate of freehold. This was later translated into the rule that the contingent remainder was destroyed unless the event upon which it was limited happened before or at the time of the termination of the preceding estate of freehold. Thus the rule became the rule of destructibility of contingent remainders. Then illogically enough, after springing and shifting future interests by way of use or devise became valid and indestructible, contingent remainders still continued to be destructible by a rule of law defeating intent even when the contingent remainder was created by way of use or devise. The characteristics of inalienability and destructibility (together, no doubt, with others) have required the drawing of a line between *contingent* remainders—which are inalienable and destructible,—and *vested* remainders—which are alienable and indestructible. Because *shifting* and *springing executory interests* were held to be indestructible it is also necessary to draw a line between them and contingent remainders.

The continuation of the rule of destructibility of contingent remainders after springing and shifting future interests become valid and indestructible: It became settled in *Chudleigh's Case*² and

¹ [The attention of the learned reader is called to further discussion of such attributes in Sweet, *Contingent Remainders and Other Possibilities* (1918) 27 YALE LAW JOURNAL, 977.—ED.]

² (1594) 1 Coke 120a, Kales, *Cases on Future Interests*, 82.

Archer's Case,³ at the end of the sixteenth century, that the rule of destructibility would apply to contingent remainders created by way of use or devise. It was not till later that it became settled that springing and shifting uses and devises were not only valid but indestructible.⁴ When that occurred the logical incongruity in leaving contingent remainders destructible by a rule of law defeating intent, if as events turned out they would take effect as springing future interests, became apparent. Renewed efforts seem, therefore, to have been made to defeat the application of the rule of destructibility of contingent remainders.⁵ These failed presumably because the feudal rule of destructibility had become established and acted upon.⁶ The announcement that contingent remainders would still be destructible in spite of the fact that springing and shifting uses and devises were valid and indestructible was made by declaring in substance that if a future interest after a particular estate of freehold could by possibility take effect as a remainder it must do so or fail entirely. It could not take effect as a springing or shifting future interest. Lord Hale in *Purefoy v. Rogers*⁷ said:

"Where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only and not otherwise."

Lord Northington in *Carwardine v. Carwardine*⁸ said:

"It is a certain principle of law, that wherever such a construction can be put upon a limitation as that it may take effect by way of remainder, it shall never take place as a springing use or executory devise."

Lord Ellenborough in *Doe v. Roach*⁹ said:

" . . . it is a rule of law that no limitation shall operate by way of executory devise, which, at the time of the testator's death, was capable of operating by way of contingent remainder."

Lord St. Leonards in *Cole v. Sewell*¹⁰ said:

³ (1599) 1 Coke 66b, Kales, *Cases on Future Interests*, 98.

⁴ *Pells v. Brown* (1620, K. B.) Cro. Jac. 590, Kales, *Cases*, 65; Gray, *Rule Against Perpetuities*, sec. 159; *Snow v. Cutler* (1664, K. B.) 1 Lev. 135; Gray, *op. cit.* sec. 165.

⁵ *Weale v. Lower* (1672, K. B.) Poll. 65; *Southcot v. Stowell* (1678, C. B.) 1 Mod. 226, 237, 2 Mod. 207; Sugden, *Powers* (8th ed.) 33-34.

⁶ *Weale v. Lower*, *Southcot v. Stowell*, *supra*; *Carwardine v. Carwardine* (1757-8, Eng. Ch.) 1 Eden, 27, 34; Sugden, *Powers* (8th ed.) 34-37.

⁷ (1681, K. B.) 2 Wms. Saund. 380, 388; Kales, *Cases*, 101.

⁸ (1757-8, Eng. Ch.) 1 Eden, 27, 34.

⁹ (1816, K. B.) 5 M. & S. 482, 491, 492.

¹⁰ (1843, Eng. Ch.) 4 D. & War. 1, 27.

"Now, if there be one rule of law more sacred than another, it is this, that no limitation shall be construed to be an executory or shifting use, which can by possibility take effect by way of remainder."¹¹

The same idea as that contained in the above quoted passages was expressed in the rule that you could not by events happening after the interests were created turn a contingent remainder into a springing executory interest. This in effect forbade any attempt to split by operation of law the contingencies upon which the contingent remainder was limited. You could not say that the happening of the contingency before or at the time of the termination of the preceding estate of freehold was one event, and that the same event happening afterwards was another, and that the two were split by operation of law because if the event happened before or at the time of the termination of the preceding estate of freehold the future interest became a vested remainder, while if it happened afterwards it took effect as a springing executory interest.

Application of the rule of destructibility in the modern cases—where the remainder is limited to an individual: Where the future interest after the particular estate of freehold was limited to an individual on an event which might happen before or at the time of or after the termination of the preceding estate of freehold, the event must happen before or at the time of the termination of the preceding estate or fail entirely. The common instance of this is where the limitations are to A for life and then to the first son of A who reaches twenty-one. Here the expressed intent is that the son of A who first reached twenty-one, either before or after the termination of A's life estate, is to take.¹² Nevertheless, if A dies before any son reaches twenty-one the entire remainder fails.¹³ Nor would the result be any different if the testator said that the rule of destructibility was not to apply. In *White v. Summers*¹⁴ it was held that where the remainder was limited to the eldest son of A "who shall first attain *or have attained* the age of twenty-one years," the testator meant to include the eldest son no matter when he reached twenty-one, whether before or after the termination of the life estate. Nevertheless the contingent remainder was destroyed. It is submitted that even if the limitations were to A for life and then to the eldest son of A who "either before or after A's death" shall have attained twenty-one, the case is not in the least altered. The meaning expressed is the same. The remainder is still limited

¹¹ Many other expressions to the same effect can be found. See Gray, *op. cit.* (3d ed.) secs. 920, 921.

¹² *White v. Summers* [1908] 2 Ch. 256, Kales, *Cases*, 134.

¹³ *White v. Summers*, *supra*. If *In re Wrightson* (C. A.) [1904] 2 Ch. 95, is *contra*, it must be regarded as wrong or as repudiating the entire rule of destructibility of contingent remainders. For explanation of this case see *White v. Summers*, *supra*; Gray, *op. cit.* sec. 926; Kales, *Future Interests*, sec. 91.

¹⁴ *Supra*.

to the same person and upon the same event precisely as it was before. There are not two gifts on separable contingencies. There is one gift in remainder on one event with a precautionary phrase declaring that it is no part of the event upon which the eldest son is to take that he shall reach twenty-one before the termination of the life estate. The future interest as limited may take effect as a remainder. The rule requires that it do so or fail.

Again, take the common case where the limitations are to A for life and then to B if he survive A. This means that B is to take whenever he survives A, either at the termination of A's life estate or after the premature termination of A's life estate, by forfeiture or merger. Yet B's remainder fails if the life estate terminates prematurely during A's life.¹⁵ Can it then make any difference that the remainder is limited "to B if he survive A, whether such survivorship occur at the time of or after the termination of A's life estate"? The expressed intent is the same as it was before. The additional words used merely emphasize the fact that B is to take no matter when the survivorship occurs with reference to the termination of the preceding life estate. This makes more plain, but it adds nothing to, what was said before. The character of the remainder is the same. It should be held destructible.

Suppose the remainder be limited to a class and when the life estate terminates no member of the class has attained a vested interest: Suppose, for instance, the limitations be to A for life, remainder to such children of A and B as survive A and B. It is conceded that this means that the children who survive A and B no matter when that occurs—whether at the time of or after the termination of A's life estate—are to take.¹⁶ Yet, if at A's death B is still living so that no children have survived B, the remainder to the entire class of children fails by reason of the rule of destructibility.¹⁷

¹⁵ *Dunwoodie v. Reed* (1817, Pa.) 3 Serg. & R. 434. The same result occurred where the remainder was limited to an individual on a collateral contingency other than survivorship. *Lyle v. Richardson* (1823, Pa.) 9 Serg. & R. 322; *Waddell v. Rattew* (1835, Pa.) 5 Rawle, 231.

¹⁶ *Cunlyffe v. Brancker* (1876) 3 Ch. Div. 933. Here Jessel, M. R., speaking of just such a future interest, says: It is impossible that the will should take effect not "through any defect of expression of intention, but through the fault of the rule of law."

¹⁷ *Cunlyffe v. Brancker*, *supra*.

So where the remainder is to a class who to take must survive the life tenant, and the life estate terminates prematurely by forfeiture or merger, none have survived the life tenant and therefore the remainder to all is destroyed: *Redfern v. Middleton* (1839, S. C.) 10 S. C. (10 Rich.) 376; *McElwee v. Wheeler* (1877) 10 S. C. (10 Rich.) 392; *Abbott v. Jenkins* (1823, Pa.) 10 Serg. & R. 296; *Stump v. Findlay* (1828, Pa.) 2 Rawle, 168; *Belding v. Parsons* (1913) 258 Ill. 422, 101 N. E. 570; *Barr v. Gardner* (1913) 259 Ill. 256, 102 N. E. 287; *Messer v. Baldwin* (1914) 262 Ill. 48, 104 N. E. 195; *Smith v. Chester* (1916) 272 Ill. 428, 112 N. E. 325; *Blakeley v.*

If the limitations are to A for life, remainder to such children of A as attain twenty-one, it must be conceded that as a matter of interpretation this means that the children of A who reach twenty-one, either before or after the termination of A's life estate, are to take. This is decisively demonstrated by the fact that the moment the rule of destructibility is removed by statute or because the interests are equitable, so that full scope is given to the expressed intent, the children who reach twenty-one after the death of the life tenant are allowed to take.¹⁸ Yet, if at A's death none have reached twenty-one none at all can take. The remainder fails or is destroyed.¹⁹

Suppose now there is added in the above cases the expressed direction that the remaindermen are to take whether the event happens before or after the termination of the life estate. Suppose, for instance, the limitations are to A for life, remainder to such children

Mansfield (1916) 274 Ill. 133, 113 N. E. 38; *Benson v. Tanner* (1917) 276 Ill. 594, 115 N. E. 191.

The same is true where the remainder is limited to a class on a collateral event other than survivorship of the life tenant, and the life estate terminates prematurely by forfeiture or merger. In such a case none of the class is entitled to a vested interest and the entire remainder is destroyed. *Craig v. Warner* (1887) 16 D. of C. (5 Mack.) 460; *Bond v. Moore* (1908) 236 Ill. 576, 86 N. E. 386.

¹⁸ *Astley v. Micklethwait* (1880) 15 Ch. D. 59, *Kales, Cases*, 122; *In re Robson* [1916] 1 Ch. 116; *In re Bourne* (1887, Eng. Ch.) 56 L. T. Rep. (N. S.) 388; *Blackman v. Fysh* (C. A.) [1892] 3 Ch. 209; *In re Freme* [1891] 3 Ch. 167, 170; *Challis, Real Property* (2d ed.) 111.

In *Festing v. Allen* (1843, Ex.) 12 M. & W. 278, after a gift to the issue of the life tenant who attained twenty-one, there was a gift over "for want of any such issue." At the death of the life tenant there were several children, but none had reached twenty-one. The gift to the children failed, but the gift over could not take effect because the event had not happened upon which it was limited, that is, because "for want of such issue" meant "for want of issue of the life tenant as should, either before or after the death of the life tenant, reach twenty-one." *Perceval v. Perceval* (1870) L. R. 9 Eq. 386, *accord*. In *Dean v. Dean* [1891] 3 Ch. 150, the legal limitations were to A for life and then to such children of A "as either before or after the death of A" should attain twenty-one. In discussing whether the expressed intent of the settlor was, in this case, any different from what it was where the limitations were to A for life and then "to such children of A as attain twenty-one," Chitty, J., says, very frankly: "So far as the testator's intention is concerned, the meaning of the limitations is the same; in both cases the testator intends that all the children who attain twenty-one, whether before or after the death of the tenant for life, shall take; and it would seem strange to anyone not acquainted with the nicety of the law relating to real property in this country, that any different legal effect should be given to a mere difference in words which mean the same thing."

¹⁹ *Festing v. Allen* (1843, Ex.) 12 M. & W. 278, *Kales, Cases*, 108; *Rhodes v. Whitehead* (1865, Eng. Ch.) 2 Dr. & Sm. 532; *Holmes v. Prescott* (1864) 33 L. J. Ch. 264; *Bull v. Pritchard* (1847, Eng. Ch.) 5 Hare, 567. In *Browne v. Browne* (1857, Eng. Ch.) 3 Sm. & G. 568, the remainder to the children was erroneously held vested subject only to be divested if the children died under twenty-one.

of A as "either before or after the death of A" attain twenty-one, and suppose at A's death no child has attained twenty-one. It is submitted that the case is not in the least altered. The meaning is exactly the same as it was before. The nature of the future interest is the same. It may still take effect as a remainder or as a springing executory interest. According to the rule it must take effect as a remainder or fail entirely. There are not two gifts to two separate classes, one to take in one event and the other in another. There is a gift to one class on one event only, namely, attaining twenty-one. The additional language is again simply a precautionary emphasis of the intention that this event is not in any way restricted so that it must occur before A's death, but that the children who reach twenty-one are to take no matter when the event happens. *Lechmere & Lloyd's Case*²⁰ rightly understood does not prevent the remainder in the case put from being destructible, in view of the fact that in that case there were at A's death children who had attained twenty-one and the question was whether the interest of those who were *in esse* but who had not attained twenty-one was destroyed. That is quite a different case subject to quite different considerations from the one now being considered where at the life tenant's death no children at all had attained twenty-one. The propriety of this distinction is dealt with at length, hereinafter.²¹ Nevertheless, Chitty, J., in *Dean v. Dean*,²² where none of the children had reached twenty-one when the life estate terminated, thought *Lechmere & Lloyd's Case* controlled and held the future interest to the children who should reach twenty-one to be indestructible. He asserted that the limitations involved were precisely the same in meaning as those presented in *Festing v. Allen*,²³ where the remainder was limited to the children who reached twenty-one without saying "either before or after the death of the life tenant." He admitted that the reasoning by which the future interest in the children who reached twenty-one was destructible in *Festing v. Allen* and took effect as an executory devise in *Dean v. Dean*, while "subtle" was "not more subtle or artificial than the reasoning of a scholastic character which the common-law judges of former times applied to cases of this kind." The court might as well have said that a distinction without a difference was allowable to avoid the feudal rule of destructibility and give effect to the testator's intention. The fact is that so long as the rule of destructibility is recognized and supported on principle, *Dean v. Dean* is logically wrong. So long as the rule of destructibility is recognized as itself an anachronism and logically a mistake after springing and shifting interests became valid and indestructible, *Dean v. Dean* may

²⁰ *In re Lechmere & Lloyd* (1881) 18 Ch. D. 524, *Kales, Cases*, 126.

²¹ *Post*, p. 665.

²² [1891] 3 Ch. 150, *Kales, Cases*, 128.

²³ *Supra*, note 18.

be justified as the refusal to apply the rule of destructibility to a remainder limited in language to which the rule had never before been applied.

Now suppose the remainder is limited to a class, but before the life estate terminates the interest of one member of the class has vested, and other members of the class are in esse who might according to the expressed intent take vested interests in the future. Typical cases stated and analyzed: Suppose the limitations are (1) to A for life, remainder to such children of A as reach twenty-one; and (2) to A for life, remainder to such children of A as "either before or after A's death" reach twenty-one. Both cases are the same so far as the expressed intent is concerned. The first means exactly what the second more emphatically says. The second gives to the children of A the same remainder as the first on the same contingency, merely inserting the precautionary phrase which emphasizes that the contingency of reaching twenty-one is to have no reference to its occurrence before the termination of the life estate. There is no separation of the children into two classes and the giving to each class an interest on a different contingency. If no children have reached twenty-one when the life estate terminated it is assumed that the entire remainder would be destroyed in both cases alike.²⁴

Suppose, however, that before the termination of A's life estate in both cases one child, X, has reached twenty-one so that the remainder has vested in him. Clearly, no rule of destructibility can interfere with X's interest. Suppose there is another child, Y, who has not yet attained twenty-one. Is his interest destroyed by A's death before Y reaches twenty-one?

In both cases alike it might be said that the interest of Y could by possibility take effect as a remainder because if Y reached twenty-one before the determination of the life estate Y would become a co-owner of the remainder with X and as such would be a remainderman. Furthermore Y's interest would be one limited on an event which might happen before or after or at the time of or after the termination of the life estate. Looked at solely in its relation to the life estate Y's interest would seem to have all the attributes of a contingent remainder which was destructible. But that would be only a partial view of the case presented. If such a remainder had been limited to a class before the statutes of uses and wills, it may be assumed that only the first member of the class in whom the remainder vested would take. The interests of the other members of the class would be looked upon as shifting future interests divesting the fee which had already vested in X and would be wholly void for that reason. When, however, a remainder to a class was attempted to be created after the statutes of uses and

²⁴ *Ante*, p. 659.

wills and by way of use or devise, it was valid so far as the other members of the class were concerned simply because shifting interests by way of use and devise were allowed. It follows that Y's interest was at all times until it vested, a shifting executory interest. It took effect by way of divesting a vested remainder in fee. It was bound from the beginning to take effect in that way if it took effect at all. It was likewise void under the feudal land law. It was valid only by way of use or devise. As such why should it not be indestructible? The fact that when it vested it was like a remainder was of no more consequence than if the limitations had been to A for life, remainder to B and his heirs, but if B died within two years to C in fee. Here C's interest, if B died within the two years and A still lived, might take effect as a remainder, but only after it had divested a previously vested remainder. Hence it was at all times till it vested a shifting executory interest and as such must have been valid and indestructible.

Obviously, the cases put at the commencement of this paragraph were bound to be the point of contention between those who would extend or press to its logical conclusion the maintenance of feudal principles regarding the validity of future interests and those who would extend to its logical conclusion the new liberty in creating future interests permitted by the statutes of uses and wills. It is not a case of one faction being right and the other being wrong, so much as it is which of two inconsistent and competing principles shall prevail in a given case. Sympathy with the changes wrought by the statutes of uses and wills so as to free testators' and settlors' efforts from the restrictions of the feudal land law, together with a lively appreciation of the fact that when springing and shifting future interests by way of use and devise were allowed and became indestructible the feudal rule of destructibility of contingent remainders not only defeated the expressed intention but became logically unsound, would (provided authority did not prevent) easily tip the scales in favor of the remainder to Y being valid and indestructible.

State of the English authorities—where the limitations are to "A for life, remainder to such children of A as reach twenty-one" and where at the time of A's death X, one of the children of A, has reached twenty-one and another, Y, has not: Fearné seems to say that Y's interest is destroyed. He says:²⁵

"For where a contingent remainder is limited to the use of several, who do not all become capable at the same time: notwithstanding it vests in the person first becoming capable; yet shall it divest as to the proportions of the persons afterwards becoming capable, before the determination of the preceding estate."

The suggestion that the child who attains twenty-one after the determination of the life estate will not take is very cautiously stated, and

²⁵ Fearné, *Contingent Remainders*, 312, 313.

Fearne cites no authorities actually holding that Y's interest is destroyed. Jarman says:²⁶

"... the rule before the act was, that those children alone took who attained twenty-one before the particular estate determined, to the exclusion of others who might afterwards attain that age."

No cases, however, are cited actually so holding where the validity of Y's interest was involved. Theobald says:²⁷

"... only those children can take whose interests become vested before the determination of the life interest,"²⁸

but he cites no cases precisely so holding and involving the right of Y to take. In *Blackman v. Fysh*²⁹ Lindley, L. J., assumes without question (though the case did not turn on this) that

"the limitations to the children were clearly contingent remainders, and if the son had died, those of his children only who had before his death attained twenty-one, or being daughters had married under that age, would take. Then we should have been obliged to give effect to the rules of law as to contingent remainders, and to defeat the intention of the testator that those who afterwards attained twenty-one should participate."

These dicta rather induce the conclusion that while direct authority may be lacking, yet conveyancers and conveyancing counsel in England have for a very long time acted upon the assumption that the above statement of the law and its application were correct. Perhaps it is now too late to overturn the conclusions stated, so that in England it must be accepted that the feudal rule of destructibility applies to Y's interest and defeats it. Yet the precarious position of such a conclusion at once appears when we have come to observe the result reached

²⁶ Vol. 1 (6th Am. ed.) *833.

²⁷ *Wills* (7th ed.) 312.

²⁸ See also Challis, *Real Property* (3d ed.) 125.

In *Mogg v. Mogg* (1815, Eng. Ch.) 1 Mer. 654, Kales, *Cases*, 232, the limitations were in substance to A for life and then to the children of B born and to be born. Some children were born before the life estate had terminated and some after. It was held that the children born afterwards could not take. It is not made clear whether this was because the rule of destructibility applied or because a rule of construction for the determination of the class fixed the testator's actual intention as including only children born before the determination of the life estate. See *post*, p. 667.

In *Archer v. Jacobs* (1904) 125 Ia. 467, 101 N. W. 195, the limitations were to A for life and then to her children. Two were *in esse* when the life estate terminated by merger. It was held that the remainder to the unborn children was terminated by the rule of destructibility. Whether this could have gone on the rule as to the determination of the class, see *post*, p. 667.

²⁹ (C. A.) [1892] 3 Ch. 209, 223.

by Sir George Jessel, M. R., in *Lechmere & Lloyd's Case* and the favor with which that case was received.³⁰

Where the limitations were "to A for life, remainder to such children of A as, either before or after A's death, reach twenty-one" and where at the time of A's death, X, one of the children of A, has reached twenty-one and another, Y, has not: Here we have precisely the same case as that dealt with in the preceding section. The fact that the remainder is limited to such children as "either before or after the death of A" attained twenty-one makes no difference in the expressed meaning. It does not make a gift to two separate classes on different events. The gift is still to the same class on the same event. Precautionary words have merely been added to make it plain that the children are to take no matter when the event occurs with reference to the termination of the preceding life estate.

Hall, V. C., in *Brackenbury v. Gibbons*,³¹ evidently observing that the case now presented was exactly the same as that dealt with in the preceding section, and believing the law to be as there stated, held the interest of Y to be destroyed.

Five years later precisely similar limitations came before Jessel, M. R., in *Lechmere & Lloyd's Case*.³² He said the rule of destructibility was "harsh. Why should I extend it?" He clearly felt that he had a case which he could deal with in the freest manner on principle and that on principle the rule of destructibility should be held down to the precise cases where its applicability had been determined by authority. The continuance of the doctrine of destructibility after springing and shifting future interests became valid and indestructible was illogical and anomalous. Jessel was prepared on this ground to refuse the application of the rule of destructibility in any case where authority did not require it. In the case where the remainder had already vested in one member of the class the feudal rule requiring the vesting of the remainder before the termination of the life estate was certainly satisfied and it was clear that the interests of the other members of the class were bound to take effect as shifting executory interests divesting a previously vested remainder. Authority, so far as judicial decisions were concerned, was apparently entirely lacking to require an application of the rule of destructibility to Y's interest. It may be assumed that the practice of conveyancers had never dealt extensively with the case where the remainder was limited to the children "who either before or after the termination of A's life estate attained twenty-one." Jessel, therefore, very properly insisted that the rule of destructibility should not be applied.

Jessel should have admitted that the logic of his conclusion would have made Y's interest indestructible where the remainder was "to

³⁰ *Post*, 666.

³¹ (1876) 2 Ch. D. 417.

³² *In re Lechmere v. Lloyd* (1881) 18 Ch. D. 524, *Kales, Cases*, 126.

such children of A as reached twenty-one," and that if Y's interest in such a case was to be regarded as still destructible it was because a long continued practice of conveyancers required that it should be so. The weakness of Jessel's opinion is that instead of doing this he put forward a purely subtle and scholastic distinction without a difference between the case where the remainder was to "such children of A as reached twenty-one" and where the remainder was to "such children of A as *either before or after A's death* reached twenty-one."

In *Miles v. Jarvis*³³ the limitations were to A for life, remainder to the children of B "living at the time of A's death or thereafter to be born." At A's death some children were *in esse* and the remainder had vested in them. Hence, the indestructibility of the gift to those afterwards to be born was clear upon the reasoning upon which *Lechmere & Lloyd's Case* is to be supported. In *In re Bourne*³⁴ the limitations were to A for life and then to such children of A as should attain twenty-one. The mystical words "before or after A's death" were not present. There was merely a clause that trustees were to take the rents and issues during the minority of any child after the life tenant's death upon trust for the child, thus showing that children who did not reach twenty-one till after the life tenant's death were expected, and expressly intended to take. Two children reached twenty-one before the life tenant died and Kay, J., held that the gift took effect in the others as an executory devise. This, it is submitted, presses *Lechmere v. Lloyd* far toward its logical conclusion that in all cases where the limitations are to A for life, remainder to such children of A as reach twenty-one, without the words "either before or after A's death" the interest of Y is indestructible.

The Massachusetts Supreme Court has extended the rule of In re Lechmere & Lloyd logically to the case where the limitations are to A for life, remainder to such children of A as reach twenty-one, and where one child has reached twenty-one before the life tenant's death: This is the holding in the recent case of *Simonds v. Simonds*.³⁵ The court seems very clearly to have perceived that where the remainder vested in two children before the life estate terminated, the interest of the other children took effect only as a shifting use and as such was not subject to any rule of destructibility. The court very properly relied upon *Lechmere & Lloyd's Case* and in Massachusetts no doubt very properly threw out any distinction between the case of a remainder to the children "who reached twenty-one" and the children who "either before or after the life tenant's death" reached twenty-one. There was, in all probability, no conveyancers' practice in Massachusetts which would require the rule of destructibility to be applied in one of

³³ (1883) 24 Ch. D. 633.

³⁴ (1887, Eng. Ch.) 56 L. T. Rep. (N. S.) 388.

³⁵ (1908) 199 Mass. 552, 85 N. E. 860, Kales, *Cases*, 148.

these cases any more than in the other. It is believed that in other American jurisdictions the result reached in *Simonds v. Simonds* ought to be and will be followed.³⁶

Where the remainder is to a class the operation of the rule of destructibility must be distinguished from the operation of rules of construction for the determination of the class: Where the limitations are to A for life, remainder to the children of B who reach twenty-one, if the rule of destructibility be in force and applicable, only such children will take as reach twenty-one before the termination of the life estate. If that rule is not in force or is inapplicable then the question arises as to how many are included in the class. This is a question of construction. If the usual rule as to personal property be followed the class will close when the life tenant dies or the first child reaches twenty-one, whichever last happens.³⁷ But if this be regarded as a rule which cuts down the natural and usual meaning because of the inconvenience of having new interests arise in personal property after it has been distributed, then where real estate is involved and there is not the same inconvenience, the natural and usual meaning of the words might be taken and the class enlarged to include all the children born at any time. This was done in *Blackman v. Fysh*³⁸ where the remainder was to children born or to be born who should live to attain twenty-one.

Now suppose the limitations are to A for life, remainder to the children of B, and B has a child or children at the date of the will, at the testator's death and at the death of the life tenant, and others are born afterwards. Does the class close at A's death? If the rule of destructibility is in force and applicable this need not be decided, because that rule will permit only those children who are *in esse* at the testator's death to take.³⁹ If the rule of destructibility be not in force

³⁶ Observe, however, that in *Archer v. Jacobs* (1904) 125 Ia. 467, 101 N. W. 195, where the limitations were to A for life and then to A's children, and before the termination of A's life estate by merger two children were born, the court held that the interest of the unborn children was destroyed. *Lechmere & Lloyd's Case* and its logical extension was not observed. Perhaps the result reached might have gone on the ground that by a rule of construction concerning the determination of classes the class closed when the life estate terminated and the remainder vested in possession.

³⁷ Theobald, *Wills* (7th ed.) 310. *In re Robson* [1916] 1 Ch. 116, *In re Bourne* (1887, Eng. Ch.) 56 L. T. Rep. (N. S.) 388, and *Simonds v. Simonds* (1908) 199 Mass. 552, 85 N. E. 860, only needed to go this far.

³⁸ (C. A.) [1892] 3 Ch. 209.

³⁹ In *Mogg v. Mogg* (1815, Eng. Ch.) 1 Mer. 654, *Kales, Cases*, 232, it is impossible to say whether the court went upon the application of the rule of destructibility or a rule of construction as to the determination of the class. The learned author in 3 Preston, *Conveyancing*, 555, evidently thought that the rule of destructibility applied. In *Archer v. Jacobs* (1904) 125 Ia. 467, 101 N. W. 195 the children born after the termination of the life estate by merger were excluded on the ground of the application of the rule of destructibility.

or not applicable, then the question of construction arises as to the determination of the class, and the reasoning already indicated is applicable. If personal property were involved the class would close at the life tenant's death.⁴⁰ If that is in accordance with the fair and primary meaning of the language used then it should apply equally where real estate is involved. If, however, the natural and primary meaning would include all the children of B born at any time, but that meaning is cut down because of the inconvenience of holding up a distribution of personalty until all possible members of the class are ascertained, then such reason of convenience would not have the same application where real estate was involved and all the children born at any time might be let in to share in the remainder.

Now suppose the limitations are to A for life, remainder to the children of B, but B has no child when the will was made or at the testator's death or at the death of the life tenant, can children born afterwards take? If the rule of destructibility is in force and applicable they cannot. If that rule is not in force or is not applicable, then if personalty were involved all the children born at any time could take.⁴¹ In *Hayward v. Spaulding*⁴² the same rule was applied to a remainder in real estate which was not destructible.

The rules for the determination of classes are rules of construction merely and yield at once to any expressed intention inconsistent with them. Where, for instance, the remainder, as in *Lechmere & Lloyd's Case*,⁴³ was limited to the children of the life tenant who should "either before or after the life tenant's death" attain twenty-one, the words quoted were obviously inserted to overcome any supposed rule of construction that where the remainder was to children who reached twenty-one only those were intended to take who had reached twenty-one when the life estate terminated. The phrase "either before or after the life tenant's death" did not therefore change the character of the remainder or the meaning to be given to the language by which it was created. It did not make distinct gifts to two different classes. In *Miles v. Jarvis*⁴⁴ the limitations were to A for life and then to the children of B "who survived A or were born afterwards." The phrase "who survived A or were born afterwards" was plainly put in to overcome any rule of construction that only such children would take as were born prior to the death of the life tenant. The extent of the class was made clear. Then the question of the destructibility (by a rule of law defeating intent) of the interest of those not born until after A's death, arose.

As to the application of the rule of destructibility where the future interest is limited on such events that it may take effect either as a

⁴⁰ Theobald, *Wills* (7th ed.) 306, 307.

⁴¹ *Ibid.* 307.

⁴² (1908) 75 N. H. 92, 71 Atl. 219.

⁴³ *In re Lechmere v. Lloyd* (1881) 18 Ch. D. 524, *Kales, Cases*, 126.

⁴⁴ (1883) 24 Ch. D. 633.

remainder or as a shifting interest cutting short a prior vested remainder in fee: In all the cases where the rule of destructibility of contingent remainders has been applied, the future interest which was destroyed has been so limited that if no rule of destructibility existed and the event happened after the termination of the preceding estate of freehold, there would be a gap in the estates expressly limited and the future interest if it took effect would have cut short a reversion in fee in possession. It should be observed that precisely the same situation may be presented except that the future interest, if it took effect, would cut short a vested remainder expressly limited which might have come into possession. Thus, suppose the limitations are to A for life, remainder to A's children (now unborn), but if A leaves no children who shall reach twenty-one then to B in fee. Here B's interest may take effect as a remainder. This occurs if A dies leaving no children. The possibility that B's interest may take effect as a remainder continues as long as A has no children. On the other hand, the moment a child is born to A it takes a vested remainder and B's interest then takes effect, if at all, as a shifting future interest. If the rule of destructibility is that a future interest which may possibly take effect as a remainder vesting before or at the time of the termination of a particular estate of freehold must do so in that way or fail entirely, B's future interest in fee will fail and be destroyed the moment A's child is born.⁴⁵

If it is a corollary of the rule of destructibility, or a part of it, or the rule itself, that future interests which may by possibility take effect as remainders, must do so or fail entirely and cannot be turned into executory interests by events happening after the creation of the limitations, then B's interest fails as soon as a child is born to A. It cannot be doubted that under the strictly feudal land law B's interest would be destroyed on the birth of a child to A. It is equally clear that when springing and shifting uses and devises became valid and indestructible the application of such a rule of destructibility was illogical and incongruous. It continued only because it had been established. But *Lechmere & Lloyd's Case* and those following it⁴⁶ show that in these days the courts regard themselves as fully authorized to refuse to extend the rule of destructibility beyond the precise cases where its application has become settled, and that any feature of the remainder which gives it a novelty sufficient to enable the court to say that its destructibility has never been passed upon is a valid ground for holding that the rule of destructibility shall not be applied to it.

The result reached in *Challis v. Doe*⁴⁷ might have gone on the ground

⁴⁵ See Gray, *Rule Against Perpetuities* (3d ed.) sec. 338, note 3, and *Challis v. Doe* (1859) 17 H. L. C. 531, Kales, *Cases*, 1059.

⁴⁶ *Ante* p. 665.

⁴⁷ *Supra*, n. 45.

that the remainder to B in the case put was subject to the rule of destructibility and could not therefore be void for remoteness. It is significant that the court refused to put its decision on that ground and insisted that the contingencies might be split by operation of law. On the contingency that A had no children B's interest was a contingent remainder and must vest if at all on A's death. In the event that A had children but they died under twenty-two, B's interest was a shifting executory devise and void for remoteness. The testator did not split the contingencies by his words. They were split by the court, by operation of law, because in one event the future interest was a remainder and in the other it was an executory devise. This splitting of the contingencies by operation of law is in fact a refusal to apply the rule of destructibility to B's interest so that it would fail the moment a remainder vested in the child of A. Such it is submitted was a proper result for the House of Lords to reach, and the decision of Jessel, M. R., in *Lechmere & Lloyd's Case* proceeds upon the application of the same principle, namely, that the rule of destructibility will not in these days be permitted to apply to any remainders presenting distinctive features to which authority or long practice does not force the courts to so apply it.

Abolition of the rule of destructibility by legislation: In the absence of any legislation abolishing the rule of destructibility even American courts, where the survival of feudal principles might be regarded as least likely to occur, have regularly recognized and applied the rule of destructibility of contingent remainders.⁴⁸ During the nineteenth cen-

⁴⁸ 1st: *Cases where the destruction of contingent remainders was held to have occurred:*

District of Columbia: *Craig v. Warner* (1887) 16 D. of C. (5 Mack.) 460.

Mississippi: *Irvine v. Newlin* (1885) 63 Miss. 192.

South Carolina: *Redfern v. Middleton* (1839, S. C.) Rice L. 459; *Faber v. Police* (1877) 10 S. C. (10 Rich.) 376; *McElwee v. Wheeler* (1877) 10 S. C. (10 Rich.) 392.

Pennsylvania: *Lyle v. Richards* (1823, Pa.) 9 Serg. & R. 322; *Abbott v. Jenkins* (1823, Pa.) 10 Serg. & R. 296; *Stump v. Findlay* (1828, Pa.) 2 Rawle, 168; *Bennett v. Morris* (1835, Pa.) 5 Rawle, 9, 15; *Waddell v. Rattew* (1835, Pa.) 5 Rawle, 231. *Dunwoodie v. Reed* (1817, Pa.) 3 Serg. & R. 435, is only *contra* to the extent of maintaining that a common recovery by the holder of the particular estate does not bar the contingent remainder. Upon this point it was clearly overruled.

Illinois: *Bond v. Moore* (1908) 236 Ill. 576, 86 N. E. 386, *Cases*, 144; *Belding v. Parsons* (1913) 258 Ill. 422, 101 N. E. 570; *Barr v. Gardner* (1913) 259 Ill. 256, 102 N. E. 287; *Messer v. Baldwin* (1914) 262 Ill. 48, 104 N. E. 195; *Smith v. Chester* (1916) 272 Ill. 428, 112 N. E. 325; *Blakeley v. Mansfield* (1916) 274 Ill. 133, 113 N. E. 38; *Benson v. Tanner* (1917) 276 Ill. 594, 115 N. E. 191.

Iowa: *Archer v. Jacobs* (1904) 125 Ia. 467, 101 N. W. 195.

2nd: *Cases containing dicta recognizing the doctrine by which contingent remainders may be destroyed:*

Kentucky: *Edwards v. Woolfolk's Adm'r.* (1856) 56 Ky. (17 B. Mon.) 376.

New Hampshire: *Dennett v. Dennett* (1860) 40 N. H. 498.

tury statutes both in England and the United States have undertaken to abolish wholly or in part the rule of destructibility.

The Real Property Act of 1845⁴⁹ provided that any contingent remainder existing after 1844 should be capable of taking effect

"notwithstanding the determination by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects, as if such determination had not happened."

This act, however, failed to provide for the case where the preceding estate of freehold terminated from causes other than those mentioned. A contingent remainder was, therefore, still liable to be defeated by the death of the life tenant before the contingency had happened. In 1877 another contingent remainder act⁵⁰ was passed which applied only to contingent remainders created by an instrument executed after August 2, 1877, and provided that every contingent remainder

"which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of a particular estate determining before the contingent remainder vests be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation."

A doubt has long existed, and still remains, whether the act of 1877 applied where the remainder was to the children of a life tenant who reached twenty-one and one child had reached twenty-one before the termination of a life estate and others were *in esse* who might do so afterwards.⁵¹ It has been suggested⁵² that a simple and comprehensive form of contingent remainders act might be worded as follows:

"No remainder or other interest shall be defeated by the determination of the precedent estate or interest prior to the happening of the event or contingency on which the remainder or expectant interest is limited to take effect."

Illinois: *Madison v. Larmon* (1897) 170 Ill. 65, 48 N. E. 556. See also *Young v. Harkleroad* (1896) 166 Ill. 318, 46 N. E. 1113, and *Spencer v. Spruell* (1902) 196 Ill. 119, 63 N. E. 621.

Haywood v. Spaulding (1908) 75 N. H. 92, 71 Atl. 219, Kales, *Cases*, 152, refused to apply the rule, but only by the subterfuge of appointing trustees to preserve the contingent remainder.

Simonds v. Simonds (1908) 199 Mass. 552, 85 N. E. 560, Kales, *Cases*, 148, as already explained, *ante* p. 666, is a correct application of the reasoning upon which *Lechmere & Lloyd's Case* is to be sustained and a logical deduction from the result reached in that case.

⁴⁹ 8-9 Vic. c. 106, sec. 8.

⁵⁰ 40-41 Vic. c. 33.

⁵¹ Williams, *Seisin*, 205; Jarman, *Wills* (6th ed. by Sweet) 1445; Vaizey, *Law of Settlements*, 1164, 1165. The point was left undecided in *In re Robson* [1916] 1 Ch. 116.

⁵² Kales, *Cases*, 155.

This, however, fails to cover the case mentioned, *ante* p. 668. To do so we might add to it the following: "and any rule which requires a future interest which by possibility may take effect as a remainder to do so or fail entirely is hereby abolished."⁵³

⁵³ The only states which seem to have a complete Contingent Remainders Act are given in Washburn, *Real Property* (6th ed.) sec. 1600, note, as follows: Ala., Ga., Ind., Ky., Mich., Minn., Mont., N. Y., N. Dak., Va., W. Va., Wis. To this should now be added Massachusetts.

In some states the act which now is in force or has existed has a partial effect only, like the English Act of 1845: *Maine*: Rev. St. 1871, ch. 73, sec. 5. *Massachusetts*: Rev. Laws 1902, p. 1268, sec. 8. The acts in both these states antedate the English Contingent Remainders Act of 1845. The Massachusetts act appears in Rev. St. 1836, ch. 59, sec. 7; the Maine act in Rev. St. 1841, ch. 91, sec. 10.

In *South Carolina* (1 Rev. St. 1893, ch. 66; 1 Code of Laws 1902, sec. 2465) the act goes no farther than to provide that a contingent remainder shall not be "defeated by feoffment with livery of seisin."

In *Texas* the statute goes no farther than to provide that the remainder shall not be defeated by the alienation of the particular estate, either by deed or will, or by the union of such particular estate with the inheritance by purchase or descent. Battis' Ann. Civ. St. 1897, sec. 626.